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Supreme Court of the United States

October Term, 1975
No. 75-447

THE CITY OF CLEVELAND, OHIO,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF OHIO,

and

CLEVELAND ELECTRIC ILLUMINATING COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, OPPOSING PETITION FOR WRIT OF CERTIORARI

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Respondent, The Cleveland Electric Illuminating Company, urges the Court to deny Petitioner's prayer for a Writ of Certiorari to review the judgment of the Supreme Court of Ohio on the ground that there is no Federal question involved in this proceeding.

THE QUESTION PRESENTED

Where a state regulatory body fixes the rates for the sale by a public utility of electric energy to consumers within the state in accordance with applicable state law, is such action unlawful under the Commerce Clause of the United States Constitution because in making its calculations it failed to segregate a small amount of interstate business where such interstate business and the rates for such interstate business are wholly unaffected by such determination.

STATEMENT OF THE CASE

Electric utility rates in the State of Ohio are regulated by the Public Utilities Commission of Ohio subject to appeal to the Supreme Court of Ohio. Such regulation does not extend to sales for resale since the statute defining which electric companies are subject to commission jurisdiction restricts the application to companies when in the business of sales to consumers within the state. Ohio Rev. Code §4905.03(A)(4). This Respondent is interconnected with electric utilities in other states and its wholesale rates within the State of Ohio as well as its rates for direct interstate sales are subject to the regulatory jurisdiction of the Federal Power Commission. 16 U.S.C. Sec. 824(a). The proceeding which is the subject of this Petition, was an application by this Respondent for an increase in all of its rates subject to the jurisdiction of the Public Utilities Commission of Ohio. Such application was granted in substantial part by the Commission in the Opinion and Order reprinted as Appendix A, page

11, of the Petition. After reversal in part on a separate appeal by this Respondent, the balance of Respondent's application was granted in an Opinion and Order reprinted as Appendix D, page 102, of the Petition.

Petitioner, the City of Cleveland, operates an electric plant and distribution system which is in direct retail competition with this Respondent in a portion of the City of Cleveland. In addition, Petitioner purports to represent the citizens of the City of Cleveland in opposition to Respondent's application for an increase in rates. For reasons which are not apparent to this Respondent, Petitioner has from the beginning objected to the failure of this Respondent in making its case and the failure of the Public Utilities Commission of Ohio in deciding the case, to make allocations so as to separate the property, revenues and expenses assignable to street lighting and to certain of this Respondent's transactions which are subject to the regulatory jurisdiction of the Federal Power Commission. The Respondent, Public Utilities Commission of Ohio, did not in this case regulate or attempt to regulate interstate sales or sales otherwise subject to the jurisdiction of the Federal Power Commission. No action taken by the Public Utilities Commission in this proceeding regulates, purports to regulate, or affects the rates and charges for electric energy which are subject to, and regulated by, the Federal Power Commission.

The tabulation set out on page 6 of the Petition, showing that approximately 6% of this Respondent's deliveries of electric energy are made pursuant to Federal Power Commission rate schedules, is misleading. The only sale for resale in the true sense of the word, is the sale to Petitioner for its municipal electric light plant under an emergency rate schedule properly characterized by the

Public Utilities Commission of Ohio engineering staff as a "temporary arrangement with the City of Cleveland" (Appendix A, p. 9) and shown on line 20, page 122 of the Petition, Appendix G. The other deliveries of electric energy to other utilities shown in the tabulation of page 6 is from page 120 of Petitioner's Appendix F. As appears, however, by page 123 of the same Appendix, these deliveries were almost exactly balanced by the receipts from the same group of companies to which the deliveries were made. For this reason, the Commission staff (and the respondent Commission) determined that these transactions did not affect the amount of production facilities required for the Company's intrastate customers, and that engaging in the transactions was "somewhat profitable to the ultimate customers" and that an allocation was unnecessary (Appendix B, page 11).

REASONS WHY THE WRIT SHOULD BE DENIED

No Federal Question Is Involved in This Proceeding

Respondent, the Public Utilities Commission of Ohio, has not attempted to regulate interstate rates or to make any determination relative to the portion of the Company's electric business which is subject to the jurisdiction of the Federal Power Commission other than to determine that the financial effect thereof was so inconsequential that it could be ignored (Pet., p. 91, Appendix C). It is difficult to see how any action by the Commission could burden interstate commerce since it does not, and does not purport, to regulate it, to require interstate business to subsidize intrastate business, to fix any rates at which

interstate commerce is carried on or to interfere in any way with any action which the Federal Power Commission might take in respect of such interstate transactions. Indeed, as we read Petitioner's brief, Petitioner does not really claim that the Commission order complained of does any of these things. Rather the claim seems to be that since this Court has held that an allocation is necessary to test the question whether rates imposed by a state are confiscatory, such an allocation is a constitutional requirement in any case whether or not any burden on interstate commerce is involved.

At most, the only theoretical effects of ignoring the interstate transactions would be to inflate the rate base or reduce the indicated profit, or both. But the only effect of either would be to increase the indicated level of rates for the intrastate business subject to the Ohio Commission jurisdiction, a matter with respect to which Petitioner might possibly have a claim under state law but which has been decided against Petitioner in the tribunals below and which certainly does not involve any Federal question.

The passage in the *Minnesota Rate Cases*, 230 U.S. 352 (1912), to which Petitioner refers at pages 4 and 5 of its petition, is to the point that the public utility may not justify unreasonably high rates on domestic business in order to meet losses on its interstate business. The Court held that an allocation to determine the proportion of railroad property utilized in the interstate business was essential because the question before the court (p. 433) was whether the state had overstepped the Constitutional limits by making the intrastate rates so unreasonably low that the carriers were deprived of their property without due process of law and denied the equal protection of

the law. This Court held that the interstate property and revenues and expenses must be allocated out before it could be ascertained whether the state rates were unconstitutionally low. This is, of course, an entirely different question than that presented by Petitioner here that a finding by the Commission that a utility's rate is fair and reasonable is tainted with illegality under the Commerce Clause of the United States Constitution because of a failure to segregate interstate business held by the Commission to be irrelevant where no claim of confiscation by the State is involved and there is no attempt to regulate or burden the interstate business.

The quotation from page 461 of the *Minnesota Rate Cases* is not a statement by the Court that an allocation is always necessary when rates are in controversy, but was made in the process of a holding that, where an allocation is made and where rates themselves are in issue, an allocation based on revenue is not a proper one because of the circularity involved.

The decision in the *Minnesota Rate Cases* itself supports our position. In one of the cases there involved (The Minneapolis and St. Louis Railway) although the allocation between interstate and intrastate commerce was held by the Court to have been erroneously made, the Court nevertheless affirmed that case because the margin of error introduced thereby was not so great as to affect the result. (p. 472).

In *Smith v. Illinois Bell Telephone Company,* 282 U.S. 133 (1930), the district court had enjoined rates fixed by the State of Illinois for telephone service in Chicago on the ground that the rate of return allowed was so low as to be confiscatory of the utility's property. It had, however, tested the adequacy of the reduced rates on

the basis of the total Chicago property without making an attempt to segregate the portion of such property devoted to interstate service. The Supreme Court held in effect that a determination of the confiscation of the utility's property could not be made unless the effect of the rates were tested against property devoted only to intrastate service. The case is not in point.

The other case cited by Petitioner is *Public Utilities Commission of Rhode Island v. Attleboro,* 273 U.S. 83 (1927), as to which it states that this Court "required allocations" when less than 3% of the company's deliveries were interstate to another utility. This is not correct. In *Attleboro* a Rhode Island utility had a contract for the sale of electric energy in interstate commerce to a company which distributed electric energy in Attleboro, Massachusetts, which contract had been originally approved by the Rhode Island Commission. Upon petition of the Rhode Island company, the Rhode Island Commission allowed an increase of these rates over the opposition of the Attleboro company. This court held that this being an interstate sale, it was not subject to regulation by the State of Rhode Island.

In short, the only sale for resale, that to Petitioner itself, was under the undisputed testimony *de minimis* in character (Appendix C, p. 13) and the other interstate transactions were substantially balanced by transactions in and out and did not have any material effect on the company's facilities.

The petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Excerpt From Staff Report of Investigation

The Cleveland Elec. Illum. Co.

Case No. 71-634-Y

The following table gives the magnitude of the mechanical and "other" forms of depreciation:

Item	Mechanical Depreciation	"Other" Forms of Depreciation	Total
Transmission Accounts	15.6	3.0	18.6
Distribution Accounts	16.5	3.0	20.1
General Plant Accounts	23.2	5.3	20.5

ALLOCATIONS

This proceeding involves all types of sales except those for street lighting and to other utilities. An allocation, less detailed but with sufficient accuracy to form a judgement, indicated no measureable effect on the rate of return by going to an extended allocation. For this reason and because street lighting is less than 1% of the total sales and because it is for the benefit of all customers, no formal allocation was made for this case.

Sales to other utilities are nil except for a temporary arrangement with the City of Cleveland.

Reserve Production Capacity

The system reserve capacity for the year 1970-71 and as anticipated for 1972 is as follows:

Year	Peak Load Year MW	Maximum Capacity MW	System Operating Reserve MW	System Operating Reserve % of load
1970	2517	2900	383	15.2
1971	2750	3205	455	16.5
1972	2805*	3205 + 165**	565	20.1

* Preliminary data

** Contract

These reserves are considered adequate but not excessive.

Land and Land Rights

The engineer's method of calculation of the contribution of Land and Land rights to the rate base differed substantially from that proposed by the company. The result of the different methods in the allocated rate base valuation is as follows:

Applicants' Value	$63,024,000
Engineers' Value	$37,836,000
Difference	$25,188,000

In determining their values the engineers referred to 4909.05 paragraphs A, B & C of the Ohio Revised Code and applied the following principles of those paragraphs:

1) Land refers to land held in fee to the exclusion of land rights leased, rented or purchased.

APPENDIX B

Excerpt From Testimony of Commission Witness Gill

Q. Are you trying to make a distinction between a barter of power, where you trade power for power at one time and a sale for money at another?

A. Yes. I think maybe that is generally true. Oftentimes interchange of power is settled for money and sometimes it is paid back in kilowatt hours. The idea being while this happened to us this year it can happen to somebody else next year.

Q. Well, whether you call it a sale or a barter, the Company certainly seems to contend, in its Annual Report, that this had an impact upon its profitability in the year 1971; correct?

A. Well, the Company no doubt has a reason for saying what they did here. As you know, I am concerned with the rate base and when I first got on the stand I explained our position as far as interchange of power and sales to other utilities was concerned. As long as these sales did not result in an amount of production facility or other facilities that were not required to service the utility's ultimate customer, then it was perfectly proper, and in our opinion—not only that, but somewhat profitable to the ultimate customers, in that if you could make sales with the somewhat underpowered production plant, and the facilities that you have that are needed for the ultimate customer, if you can make sales out of that equipment and the profits of such sales, whatever they are, or losses go to the ultimate customer, then the amount of production facilities is reasonable. But, if the amount of production facilities, for instance, is not reasonable, then

you judge that sale to other utilities was a major business of the Company. But, in this case it seemed like it—while it happened that they were forced to rely on other means or other older equipment, they were still able to do it.

So, as long as the production facilities are a reasonable amount for the ultimate customer, I don't see how we can make any correction in the rate base. And we didn't, for that reason.

Now, if sales to other utilities is a big business and they have to provide production equipment, other production equipment to handle it, that might be a different story.

I believe we analyzed this in the opening remarks, production facilities being reasonable for the ultimate customers. The fact that they were able to take care of, with this facility, without any extra facilities, seems to fall in line with whether or not we think sales to other utilities are unreasonable.

Now, you are bringing out that—they didn't—

APPENDIX C

Excerpt From Testimony of Company Witness Loshing

A. Technically, no. At one point in one of these emergencies we connected that line up to your station Buss at your 53rd Street plant. You had to separate and isolate your Buss. So that, in effect, it was nothing more than a load transfer, it was a reverse power. It was not a free-flowing, synchronized connection. We used it as a means of more of a load transfer.

Q. Fine. Then, do you also, from time to time, both in the test year period and subsequently, sell power to the Municipal Electric Light substations located at various points within the City of Cleveland?

A. Yes, these are the five and six transfer points that I alluded to in the previous answer.

Q. Now, Mr. Loshing, can you tell us whether there is in your Company's case a separation made of the plant that has been servicing in part the Cleveland Municipal Electric Light Plant?

A. In this case? You mean this case?

Q. Yes, this instant case, 71-634-Y.

A. No, we have not made such a separation. We concur in the Staff's position that this was de minimis and inconsequential.

Q. Now, directing your attention to Page 18 of the Staff Report.